International Photographers of the Motion Picture Industries, Local No. 644 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO *and* James F. Maher, Esq., and King-Hitzig Productions, Party to the Contract and Jessica M. Burstein, Party in Interest. Case 2-CB-7361

February 4, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 13, 1981, Administrative Law Judge George F. McInerny issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions, supporting briefs, and answering briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge as modified herein.

The Administrative Law Judge found that Respondent violated Section 8(b)(1)(A) and 8(b)(2) of the Act in July 1978. We agree for the following reasons. As the Administrative Law Judge found, Respondent tabled Jessica M. Burstein's application for membership in April 1978. In July 1978, it pressured King-Hitzig Productions, a firm which wished to hire Burstein, first, to seek Respondent's approval for Burstein to work on a film as a nonunion employee and, second, to hire a union still photographer in place of Burstein. Respondent thereby interfered with the employment relationship between Burstein and King-Hitzig because she was not a member while it simultaneously refused to admit her to membership. These actions clearly restrained and coerced Burstein in the exercise of her Section 7 rights and caused King-Hitzig to discriminate against her with regard to her employment on a ground other than her refusal or failure to tender union dues and fees. *International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 7, AFL (Seattle Construction Council)*, 92 NLRB 753, 763 (1950). We therefore find it unnecessary additionally to rely, as did the Administrative Law Judge, on his finding that Respondent had discriminatorily refused membership to Burstein.[2]

AMENDED REMEDY

Having found that Respondent has violated Section 8(b)(1)(A) and 8(b)(2) by requiring that it approve Burstein's presence on King-Hitzig's film set and by subsequently causing King-Hitzig to remove her from its payroll, we shall order that it cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In accordance with our recent decisions in *Iron Workers Local 118, International Association of Bridge and Structural Ironworkers, AFL-CIO (Pittsburgh Des Moines Steel Company)*, 257 NLRB No. 78 (1981), and *Sheet Metal Workers' Union Local 355, Sheet Metal Workers' International Association, AFL-CIO (Zinsco Electrical Products)*, 254 NLRB 773 (1981), we shall require that Respondent (1) make Jessica M. Burstein whole for all losses of wages and benefits suffered as a result of Respondent's discrimination against her from the date of Respondent's unlawful conduct until she is reinstated by King-Hitzig to her former or substantially equivalent position or until she obtains substantially equivalent employment elsewhere;[3] (2) notify King-Hitzig in writing, with a copy to Jessica M. Burstein, that it has no objection to her hiring or employment; and (3) affirmatively request that King-Hitzig hire her for the employment which she would have had were it not for Respondent's unlawful conduct, or for substantially equivalent employment.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] The Administrative Law Judge concluded that Respondent violated Sec. 8(b)(1)(A) in April 1978 by discriminatorily denying membership to Burstein. Respondent excepts to this conclusion, relying partly on the fact, as noted by the Administrative Law Judge, that there was no showing that its conduct had an adverse impact on Burstein's employment in April 1978. It also contends that the matter was not fully litigated, and notes that the General Counsel did not allege such a violation until his post-hearing brief. We find it unnecessary to pass on the Administrative Law Judge's finding of this additional violation since, in light of the other violations found herein and Burstein's subsequent admission to Respondent's membership, the finding of such an additional violation would not materially affect our Order.

[3] Loss of earnings, if any, shall be computed in the manner set forth in *F. W. Woolworth Company*, 99 NLRB 289 (1950), with interest thereon computed in the manner set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

We recognize that, due to the nature of employment in the film industry, the facts of this case may present issues concerning the proper application of the remedy herein. We leave the resolution of any such issues to the compliance stage of these proceedings. In agreement with the Administrative Law Judge, we also leave to the compliance stage the determination of the effect, if any, of a letter from Herbert Burstein, counsel for Jessica M. Burstein, to the Administrative Law Judge, dated March 19, 1979.

We have also found, in agreement with the Administrative Law Judge, that Respondent violated Section 8(b)(1)(A) by maintaining in its contracts union-security clauses which do not provide for the statutory 30-day waiting period before requiring union membership. Since not all of the parties to Respondent's contracts are before us, however, we shall not adopt the Administrative Law Judge's recommendation that Respondent be ordered to revise the union-security provisions of its contracts. Rather, we shall order Respondent to notify each employer with whom it has a contract, by mailing each a copy of the attached notice marked "Appendix" that the provisions found herein to be violative of the Act will be given no further force or effect. See *American Guild of Variety Artists, AFL-CIO (Fontainebleau Hotel Corporation, d/b/a Fontainebleau Hotel)*, 163 NLRB 457, 474 (1967).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Photographers of the Motion Picture Industries, Local No. 644 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, New York, New York, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Causing or attempting to cause King-Hitzig Productions to cease paying Jessica M. Burstein for her work or otherwise discriminate against her because of her nonmembership in Respondent.

(b) Requiring King-Hitzig Productions to obtain permission from Respondent before allowing employees of King-Hitzig Productions on its sets or filming locations.

(c) Maintaining in its contracts with producers of feature films and commercials union-security provisions which do not provide the statutory 30-day waiting period before requiring union membership.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Make Jessica M. Burstein whole for all losses of wages and benefits suffered as a result of its discrimination against her in the manner set forth in the "Amended Remedy" herein.

(b) Notify all employers with which it has a collective-bargaining agreement, by mailing each a copy of the attached notice marked "Appendix," that the union-security provisions, found herein to be violative of the Act, will be given no further force or effect.

(c) Post at its offices and meeting rooms copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Deliver to the Regional Director for Region 2 signed copies of the notice for posting by King-Hitzig Productions, if willing, in places where notices to employees are customarily posted.

(e) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Following a hearing at which all parties had an opportunity to present evidence and cross-examine witnesses, the National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post and distribute this notice. We intend to abide by the following:

WE WILL NOT cause or attempt to cause King-Hitzig Productions to cease paying Jessica M. Burstein for her work or otherwise discriminate against her because of her nonmembership in Local No. 644.

WE WILL NOT require King-Hitzig Productions to obtain permission from Local No. 644 before allowing employees of King-Hitzig Productions on its sets or filming locations.

WE WILL NOT maintain in our contracts with employers union-security provisions which do not provide the statutory 30-day waiting period before requiring union membership.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make Jessica M. Burstein whole, with interest, for all losses of wages and benefits suffered as a result of our discrimination against her until she is either reinstated by King-Hitzig Productions to her former or a substantially equivalent position or until she obtains substantially equivalent employment elsewhere.

WE WILL affirmatively request that King-Hitzig Productions hire Jessica M. Burstein for the employment which she would have had were it not for our unlawful conduct, or for substantially equivalent employment.

WE WILL notify all employers with which we have collective-bargaining agreements that the union-security provisions found by the Board to be violative of the Act will be given no further force or effect.

INTERNATIONAL PHOTOGRAPHERS OF THE MOTION PICTURE INDUSTRIES, LOCAL NO. 644 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO

DECISION

STATEMENT OF THE CASE

GEORGE F. MCINERNY, Administrative Law Judge: On July 25, 1978, the charge in this case was filed by James F. Maher.[1] The charge alleged that International Photographers of the Motion Picture Industries, Local No. 644 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, herein referred to as the Union, Local 644, or Respondent, had discriminated against Jessica Burstein in violation of Section 8(b)(1)(A), 8(b)(2), and 8(b)(5) of the National Labor Relations Act, as amended, 29 U.S.C. 151, *et seq.*, herein referred to as the Act.

Thereafter, on September 13, 1978, the Regional Director for Region 2 of the National Labor Relations Board, herein referred to as the Board, issued a complaint alleging that the Union had discriminated against Jessica Burstein by denying her the opportunity to be employed by King-Hitzig Productions, herein referred to as King-Hitzig or the Employer, and by maintaining an initiation fee which in all the circumstances is excessive and discriminatory. Respondent filed an answer in which it denied the commission of any unfair labor practices.

Pursuant to notice accompanying the complaint herein, a hearing was held before me in new York, New York.[2] The hearing opened on February 27, 1979. At that time it appeared that the parties had arrived at an informal settlement of the issues. The hearing was accordingly adjourned until April 2, 1979. In the meantime the Union and Jessica Burstein worked out their differences. Miss Burstein was given full membership rights in the Union and, in a letter to me dated March 19, 1979, from her attorney and father, Herbert Burstein, stated that she waived any remedy which the Board could ultimately award. In addition, Mr. Burstein requested that I permit the instant charge to be withdrawn either in its entirety or, alternatively, those portions of the charge alleging violations of Section 8(b)(1)(A) and 8(b)(2) of the Act. On March 22, 1979, counsel for the Union wrote me a letter setting forth a similar description of the agreement between Miss Burstein and the Union, and requesting that I permit the charges in this case to be withdrawn. The General Counsel, in turn, sent me a telegram voicing his opposition to the proposed withdrawal on the basis that the informal settlement did not settle "questions of closed shop practices" affecting "more than just an individual filing a charge at the Board." In addition, the General Counsel mentioned that another charge had been filed with the New York Regional Office[3] which might be consolidated with the instant case.[4]

The hearing resumed on April 2, 1979. At that time I denied the requests of the Union and the Charging Party to withdraw the charges (and to dismiss all or part of the complaint).

The hearing was then adjourned, *sine die*,[5] to allow the Union to appeal my ruling to the Board. On July 20 the Union addressed a letter to the Board requesting permission to appeal from my decision. The General Counsel duly filed an opposition to this request. The request was denied in a telegram from Associate Executive Secretary George A. Leet.[6]

Following receipt of the Board's ruling, and by agreement of the parties, the hearing resumed on September 7, 1979, at which time I reviewed with the parties subpenas issued by the General Counsel to Respondent and a petition to revoke the subpenas filed by Respondent. I made a number of rulings on these matters and at the close of the day adjourned the hearing, again *sine die* to allow the General Counsel to appeal those rulings, in the instances adverse to him, to the Board, and to move in the United States district court to enforce a subpena requiring Jessica Burstein to appear and testify in this matter.[7] The

[1] Maher is or was a lawyer employed in the firm of Zelby, Burstein, Bernstein and Hartman. Herbert Burstein, a member of that firm, is the father of Jessica M. Burstein, the Party in Interest in this case.

[2] Respondent's motion to correct the transcript is granted.

[3] Case 2-CB-7742 (Warner Bros., Inc.).

[4] This did not happen. I am unaware of the disposition of Case 2-CB-7742.

[5] At that time it seemed probable that an informal settlement between the parties could be reached. It did not, however, work out.

[6] The telegram noted that then Board Member Murphy would have granted the appeal and approved the settlement.

[7] Miss Burstein had notified the General Counsel that she would not appear voluntarily and testify in this proceeding.

Union filed an opposition to the General Counsel's appeal of my rulings. That appeal was denied, again telegraphically, over the signature of Associate Executive Secretary Enid Weber, under date of November 9, 1979.

On March 21, 1980, the General Counsel filed an "Application for Order Requiring Obedience to *Subpoena ad Testificandum*" in the United States District Court for the Southern District of New York (Case M-18-304). As a result of this application, the court (Canella, J.) issued a consent order on March 31, 1980, ordering that Jessica M. Burstein appear before me in this hearing.[8]

After this, the hearing resumed on May 27, 1980,[9] continued on May 28, and concluded on May 29. At the hearing all parties had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally. Following the hearing the Union and the General Counsel filed briefs, which have been carefully considered.

Based upon the entire record in this case including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The jurisdiction of the Board over the Employer herein is not in question. I find that the Employer, King-Hitzig Productions, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The International Alliance of Theatrical Stage Employees (IATSE) is a union established along craft lines, with jurisdiction over technical craft and support phases of the motion picture, stage, and television industries. The record in this case shows that IATSE comprises 38 crafts, trades, and occupations organized into separate locals.

Those employees who are members of IATSE and who actually engaged in photography, whether on tape or film, and auxiliary equipment necessary for the operations of cameras are gathered into three locals in the United States. Local 659, located in Hollywood, is the largest of the three, representing about 3,000 employees, and has jurisdiction over the western States. Local 666 is headquartered in Chicago. It is the smallest of the three, and has jurisdiction over 22 States in the central part of the country. Local 644, Respondent here, has something over 800 members, and has jurisdicton over the east coast from Maine to Georgia. Local 644 is based in New York City and much of the work its members do is performed there, although the record indicates that camera crews who are members of Local 644 may be dispatched to other parts of the United States, or abroad, with some frequency.

Local 644 has collective-bargaining agreements with a number of companies engaged in the production of films produced to be shown either in theaters or on television. The contract in effect during the times material here contains a union-security provision requiring:

> 2(c) All cameramen in the employ of the Producer on the date hereof, and all cameramen hereafter hired shall, as a condition of continued employment, be or become members of Local 644 not later than the 31st day following the beginning of their first employment as hereinafter defined, or the effective date of this sub-paragraph, whichever is later, and all such cameramen, upon being or becoming members of Local 644 as aforesaid, shall be required, as a condition of continued employment, to maintain such membership in good standing during the life hereof.
>
> (d) "First employment" as referred to in subparagraph (c) hereof shall (unless and until determined by the General Counsel of the National Labor Relations Board, the Board, or a court of competent jurisdiction) mean the first such employment for producers under contract with Local 644 on or after the execution of this agreement, within any of the classifications covered hereby.[10]

Article 7 of the contract is a general provision covering, among other matters, crew size and composition on feature films.[11] Article 7(j) provides:

> "On all features (theatrical or television) and on production of Television Series, the photographic working crew shall consist of a First Cameraman, Operative Cameraman, First Assistant Cameraman and Second Assistant Cameraman."

Section (n) states:

> On all feature productions (theatrical or television) a Still Cameraman shall be a mandatory part of the crew when all or a major (at least two-thirds) portion of the production is being photographed within the jurisdiction of Local 644. If less than all or a major portion of the feature is being photographed in Local 644's jurisdiction, the Still Cameraman shall be a part of the crew so long as the shooting continues with any featured member of the cast. In all other cases where still photography of any kind

[8] Judge Canella's order required Miss Burstein to appear at this hearing which was then scheduled for April 7, 1980. Due to a transit strike in New York, the matter was postponed by agreement of all parties until May 27, 1980, at which time Miss Burstein did appear and testified.

[9] David Kapelman, who had been serving as counsel for the General Counsel, resigned from the Regional Office in April 1980. He was succeeded at these last 3 days of the hearing by Carole Sobin.

[10] Substantially the same provisions govern employment under a separate agreement between Local 644 and producers of television commercials.

[11] King-Hitzig Productions is a joint venture organized to produce a feature film for television under an arrangement with the American Broadcasting Company (ABC).

is used in connection with a production, a Still Cameraman shall be a part of the crew.

Section (i) of the same article states:

"Operation of still cameras shall be performed only by Still Cameramen represented by Local 644."

By way of explanation, the record in this case shows that feature films consume anywhere from 3 weeks to several months in actual filming time. Still pictures (as opposed to the moving pictures which are being taken as part of the production) are used to record the actors' makeup, as well as the arrangement of the set, at the end of each day, so that uniformity of appearance and arrangement can be maintained. Still photographs are also used for advertising and publicity purposes.

The collective-bargaining agreement also sets out wage scales and classifications for the period covered by the facts in this case as follows:

Director of photography (first cameraman)	$249 per day
Operative and additional cameraman	$195 per day
Assistant cameramen	$115 per day
Second assistant cameraman	$91 per day
Still cameraman	$146 per day

It should be noted further that the contract specifically permits individual employees to negotiate better terms and conditions than those set out therein. It is manifest from all the testimony on the subject herein that Local 644 perceives itself as an elite organization, made up of members possessing unique and precious artistic talent. Thus, Respondent's business representative, Darwin Deen, testified that directors of photography, entitled under the terms of the contract to $1,245 per week, average $6,000 for the same period in Local 644's jurisdiction (and $15,000 a week in the Hollywood Local 659). Most other classifications, according to Deen, similarly negotiate arrangements at varying amounts above the scales set out in the contract.

This fortunate state of things is more than offset by chronic and severe unemployment in the industry. According to the testimony of Darwin Deen, and in communications from Deen and Union President Larry Racies to the membership printed in the Union's bulletin, the problem, caused in part by the employment of aliens on films made in the United States, the use of nonunion crews, and the incursions of a rival union, Local 15 of the National Association of Broadcast Employees and Technicians, AFL-CIO (NABET), affected the majority of Respondent's members.[12] The attitude of Local 644 and its officers toward Local 15 NABET as expressed in Local 644's bulletins, and in Deen's comments at the hearing, was one of unremitting hostility.

Aside from these external causes for the serious unemployment among Respondent's members, the membership and the leadership recognized another, internal, cause; namely, the number of members on Local 644's roster. The perception of the membership in the spring of 1978 was that there were too many members, and that to process more applications and admit more new members would work to the disadvantage of the existing membership by further reducing opportunities for work. This view was opposed by President Racies and Business Representative Deen, at least as reported in the Union's bulletin, but on March 27, 1978, the Union's executive board voted to table all applications for membership until a membership policy committee appointed to recommend a new policy acceptable to the executive board and the membership did so. The committee report was due by May 15, 1978, but apparently no mutually acceptable plan was forthcoming until October 1978 when the bulletin for that month announced that at a meeting in September a new membership policy was adopted. This policy required prospective applicants to be issued an "information sheet" rather than an application. This sheet would then be screened by union officials to ascertain if the member was qualified to receive an application. In addition, the new policy tied the reception of new members to the percentage of current members unemployed during a given period.

This new policy was adopted despite the vehement objections of President Racies as expressed in the June 1978, summer 1978, and October 1978 bulletins, and remained in effect until at least the first half of 1979.

Meanwhile, Jessica M. Burstein, on whose behalf the charge in this case was filed, had been employed in the late 1970's by the National Broadcasting Company (NBC) as a still photographer. While she was employed at NBC, Burstein participated in a union organizing campaign. In this campaign both Local 644 and Local 15 NABET were competing for the loyalties of the employees. Burstein was approached by representatives of Local 644[13] both as a member of the employees' group, and individually, in efforts to persuade her to support Local 644. But she declined and instead threw her support to NABET, which became the representative for the employees involved, including Burstein.[14]

In March 1978 Jessica Burstein had started working for herself as a photographer. In pursuance of her career objectives she went to the offices of Local 644 to apply for membership. There she spoke with Business Representative Darwin Deen. According to Burstein's testimony, which I credit and which was corroborated by Deen, he told her that her membership application would not be processed at that time. She mentioned her experience at NBC and Deen replied that the fact that she had worked for NBC in a unit sought by Local 644, and that

[12] In a letter to Senator Daniel P. Moynihan of New York, reprinted in the June 1978 edition of the bulletin, Deen estimated that unemployment at 75 percent but revised that figure downward in his testimony. There is no dispute that the unemployment rate was inordinately high.

[13] Since those representatives were not identified in the complaint, nor alleged to be agents of Local 644, I have not considered statements attributed to them by Burstein, but I do credit her testimony, which was credible and undenied, that she was approached by those representatives.

[14] Further details of the relations between this group of employees of NBC are not important to the issues in this case. Apparently there was an unsuccessful strike and, possibly as a result, Burstein left NBC in the early spring of 1978.

the unit had rejected Local 644, might hurt her chances for getting into Local 644. He said "people" in the Union were angry about the NBC situation. Burstein was not admitted into membership at that time.

It is in this context that the facts in this case developed.

B. *The Alleged Discrimination Against Jessica Burstein*

During her employment with NBC Jessica Burstein had met, and apparently impressed, Rupert Hitzig, president of Rupert Productions and a film producer of some 15 years' experience. Sometime in the spring of 1978 Hitzig formed a joint venture with Alan King Productions, Inc., which took the name of King-Hitzig Productions (King-Hitzig). One purpose of the joint venture was to produce a film to be shown on ABC television and to be entitled "How To Pick Up Girls." Despite the title, this was to be a serious effort by a number of presumably talented individuals and budgeted at $1,100,000. Actual production was to start on July 10.

Toward the end of June, Hitzig and Jessica Burstein discussed her employment on the film as a still photographer. Beyond the usual requirements for the still photographer on this production, the script called for a principal character, who was hinself a photographer, to use photographs taken on the set as a part of the plot. Thus, a portion of the still photographer's work product would become an integral part of the film. As the result of these discussions between Hitzig, Burstein, and King-Hitzig's production manager, Bruce Pustin, Burstein was hired on June 30 as the still photographer for "How To Pick Up Girls" at the Union's scale which was then $146 per day.

There was some conversation between Pustin, Hitzig, and Burstein concerning the fact that she was not a member of Local 644. It is clear from Hitzig's testimony that Burstein was hired as the still photographer on the set; that he was aware that she was not a member of Local 644; and that Local 644 required that a still photographer be on the set of a feature film.[15] Hitzig's motivations in all of this are not so clear. For example, he testified that the film, "How To Pick Up Girls," was budgeted for only one still photographer. Then, on July 6, he wrote to Darwin Deen requesting permission to use Burstein as "a still photographer" on the set, and setting out the "unique situation" present in this film and Burstein's ability to fill these production needs. He closed with the statement that he understood the matter would have to be discussed with the Union's executive board, and that King-Hitzig would have "a Local 644 still photographer on the set as well." Burstein testified that Hitzig told her he would back her right to be on the set, and would be supportive of her as long as the Union did not pull its crew off the set. She further stated that Pustin told her to go and check with Deen to find out whether she could actually work on the film.

After this last conversation Burstein did call Deen and asked him if she would be prevented by the Union from working. Deen told her that "by law we can't prevent you from working" and told her the matter of whether she could come on the set as a nonunion person with a standby would have to be decided by the Union's executive board.[16]

It is thus evident that Burstein knew what she wanted to do—to be the still photographer on the set of "How To Pick Up Girls." Hitzig's motivations are not so clear. On the one hand he assured Burstein that she was to be the still photographer on the film. On the other hand he stated in his letter to Deen that he understood that he would be required to hire a Local 644 member as still photographer for the file. At the same time Hitzig knew that he was budgeted for only one still photographer.

Burstein reported for work on July 10 at the beginning of the production and she worked, alone, as the still photographer on the set.

On that same evening the Union's executive board met and considered King- Hitzig's request regarding Burstein's employment. Dean testified that he had gained the impression that Hitzig's request and Burstein's call indicated that what they wanted was for Burstein to be a "special" photographer on the film. Special photographers were described in the record as people possessing special, even unique, talents and who may be used to perform specific functions on a set. However, Dean's testimony was contradicted by an excerpt from the minutes of the Union's executive board for July 10. The minutes submitted in evidence show that the board considered a request from King-Hitzig to "use applicant[17] Jessica Burstein as Still Cameraman and has requested permission for her to work . . . ." The minutes went on to record that the board voted to "get a full five man crew and allow Ms. Burstein to do actor's point of view pictures only." I accept the executive board minutes as accurately reflecting what occurred at the meeting, and I reject Deen's testimony that Burstein was actually seeking to be a special photographer on the film.

The next morning another still photographer, Curtis Kaufman,[18] reported to the set. According to Hitzig, they had to hire Kaufman because they were required to have a still photographer on the set when shooting a union film. He added that Burstein was not a member of the Union so they had to hire Kaufman. If Burstein had been a union member it would not, according to Hitzig, have been necessary to hire another still photographer. Bruce Pustin informed Burstein on July 11 that since she was not a member of Local 644 the Company had to put a union person on the set. Pustin told Burstein that Kaufman had to be paid, but she was not, since they could afford one still photographer.

Burstein contlnued to work on the film even though she was not paid until the filming was concluded, a period of 4 weeks. The evidence shows that she did re-

[15] The actual agreement between King-Hitzig and Local 644 was not executed by Hitzig until July 5, 1978, and by the Union on July 26, 1978. However, Hitzig is a producer with 15 years' experience. I infer and find for that reason that he was aware of local 644's contractual requirements.

[16] This was substantially corroborated by Deen.

[17] An excerpt from the executive board minutes of April 10, 1978, shows that Burstein's application had been tabled.

[18] Respondent maintains that there is no evidence that Kaufman is a member of Local 644. However, he was identified as such by Hitzig, and an exhibit prepared by Local 644 and received in evidence herein shows that Curtis H. Kaufman was initiated as a member of Local 644 as a still photographer on July 1, 1976.

ceive a check for 1 week's pay, but that she returned that money to King-Hitzig. Kaufman was paid for 5 full weeks. There was no evidence on what either Burstein or Kaufman actually did during the filming.[19]

Reviewing these facts in consideration of the several allegations of the complaint, I first will consider the question of Respondent's refusal to grant membership to Jessica Burstein in March 1978. While this is not alleged in the complaint as discriminatory, the General Counsel does claim in her brief that this action by Respondent was discriminatory and did violate Section 8(b)(l)(A) and 8(b)(2) of the Act. The matter was fully litigated at the hearing and I feel in the circumstances there is no prejudice to any party in my deciding the issue.

The facts on this point are clear and undisputed. Jessica Burstein went to Respondent's offices and spoke to Business Representative Deen. Deen informed her that her chances for getting into the Union were not good, and he mentioned that her past affiliation with Local 15, NABET, and her concurrent rejection of overtures by Local 644 would be held against her. Deen's own hostility to NABET was manifest in his demeanor while testifying, and the feelings Respondent President Racies as expressed in the columns of its newsletter I find accurately reflect the views of Respondent toward NABET.

Respondent maintains that Burstein's failure to gain membership resulted from its policy, uniformly applied from March 27, 1978, on, to table and refuse to act on all applications for membership. However, the list submitted in evidence listing new members of Respondent shows that from March 28, 1978, the day after the executive board voted to table all membership applications to July 10, 1978, when Burstein began working for King-Hitzig, 23 people were accepted into membership. From July 10 until the end of 1978 10 more members were accepted.

Because of this contradiction between what Respondent says and what the evidence shows, and the undenied existence of a discriminatory motivation, I find the action of Respondent in denying union membership to Burstein at the executive board meeting of April 10, 1978, to be a violation of Section 8(b)(l)(A) of the Act. There is, however, no evidence in this record that Burstein sought employment anywhere else between April and her talks with Hitzig in late June. Thus, I cannot find a violation of Section 8(b)(2) in this matter in that time period.

Based upon the facts outlined above, there is no question but that Jessica Burstein was hired by King-Hitzig to be the still photographer on the film "How To Pick Up Girls" in late June 1978. The film was budgeted for one still photographer and the check and the payroll slip entered in evidence show that Burstein was on the payroll, and was paid, for 1 week. On July 5 there was a conversation between Darwin Deen and King-Hitzig's production manager, Bruce Pustin. There is no direct evidence on this conversation. Deen did not mention it during his extensive testimony, and Pustin was not available as a witness during the hearing in May 1980. The substance of the conversation can, nevertheless, be reconstructed from documents in evidence and from other testimony. For example, it appears from Rupert Hitzig's letter of July 6, 1978, to Darwin Deen that the letter was written as a result of that conversation. It further appears that Deen required that the letter be written as a formal request from the Employer to be permitted to use Jessica Burstein as the still photographer on the film "How To Pick Up Girls." Thus, I infer and find that Respondent, acting through Deen, required King-Hitzig formally to request permission for Burstein to work on the film.

The last paragraph of the July 6 letter likewise furnishes an insight into the substance of the conversation of July 5 between Deen and Pustin. In that paragraph Hitzig wrote, "It is our understanding that this matter will be discussed by the Executive Board and, if approved, we will also have a Local 644 still photographer on the set as well [sic]." This agreement to employ a Local 644 still photographer runs contrary to the testimony of both Burstein and Hitzig to the effect that Burstein was to be the only still photographer on the set. The film was budgeted for only one still photographer. There was no indication from the reported conversations between Hitzig and Burstein that a standby photographer was to be hired. But both knew that Burstein was not a member of Local 644, and Hitzig had assured Burstein that he would back her until the Union started to pull the crew off the set. Therefore, even in the absence of direct testimony, I infer and find from the hostility shown to Burstein by Deen because of her former association with NABET; the fact that Hitzig had hired Burstein with the warning that he would not back her, i.e., continue her employment, if he were threatened with a walkout by Respondent; and the statement in the July 6 letter, contrary to Hitzig's prior statements, that a Local 644 still photographer would be hired; that this shift resulted from pressure applied by Deen in his conversation with Pustin on July 5. The natural and probable result of such a conversation was exactly what happened; Burstein was advised that she would not be paid for her work.

In accord with these findings and inferences, I find that Respondent has violated Section 8(b)(1)(A) and 8(b)(2) by requiring that it approve the presence of Burstein on the set. *International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 7, AFL (Seattle Construction Council)*, 92 NLRB 753 (1950). Respondent's arguments that it is responsible for keeping the set or filming area free from "papparazzi"[20] or other unwanted intruders rings hollow. There is no indication in the collective-bargaining agreement, or elsewhere in the record, that the Union has any right or obligation to ensure the tranquility of an employer's set or filming location.

I find further that Respondent has violated Section 8(b)(1)(A) and 8(b)(2) in that it caused King-Hitzig to remove Burstein from its payroll, since Respondent had, as I have found, discriminatorily refused to admit her to membership. *Western Gillette, Inc.*, 201 NLRB 662 (1973).

[19] Hitzig testified that the photographs which he had hoped would be an "integral part of the film" in the end were not used at all.

[20] Papparazzi are freelance photographers whose business consist of taking photographs of celebrities which they may later sell to newspapers or magazines.

C. *Respondent's Union-Security Clause*

The General Counsel maintains that the union-security provisions, quoted above, in the collective-bargaining agreement between King-Hitzig and Respondent are unlawful and discriminatory within the meaning of Section 8(b)(1)(A) of the Act.

In evaluating this allegation, I am not unmindful of the problems which the Union faces due to the transient nature of the film production business; the woeful level of unemployment among its members; the fact that many of those members may make individual arrangements with employers both in terms of compensation and periods of employment; and intense competition for jobs with NABET, with foreigners, and with nonunion producers. The evidence here shows that employees may work for a number of different employers over the course of a year. Some of these employers maybe, as King-Hitzig apparently was, established for the purpose of making only one or two films. The evidence further shows that the shooting of a feature film usually lasts for only 3 to 5 weeks. It is thus understandable that the Union would take steps to assume continuity in membership and to preserve its integrity as a factor promoting and preserving the interests of its members in the industry.

The Union is not entitled to take measures which tend to interfere with the rights bestowed by the Act on employees and those who seek to be employees alike. Here, the definition of "first employment" contained in section 2(c) and (d) of the collective-bargaining agreement, requiring the accumulation of 31 days, even if that time is spent in working for different employers, and thereafter requiring union membership, clearly contravenes the statutory intent of Section 8(a)(3) of the Act governing such agreements.

There is no indication here, as in *International Photographers of the Motion Picture Industries, Local 659 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (MPO-TV of California Inc., Y-A Productions, Inc.)*, 197 NLRB 1187 (1972), of the existence of a multiemployer bargaining unit which might, even in the absence of continuous employment, provide some theoretical basis for legality to Respondent's union-security provisons. Here, even if there is a multiemployer unit, it is evident that King-Hitzig signed the contract as an individual employer. In this case, if an employee came to work for King-Hitzig with, say, 10 days of experience with another producer covered by the contract, he or she would be required to join Respondent no later than the 21st day of employment with King-Hitzig. Thereafter, this hypothetical employee could not go to work for any producer unless he or she continued as a member in good standing, through the duration of the contract or as long as this clause was perpetuated from contract to contract.

In the light of these conclusions I find that, by entering into and maintaining these union-shop provisions, Respondent has violated and is violating Section 8(b)(1)(A) of the Act. *Convair, A Division of General Dynamics Corporation*, 111 NLRB 1055 (1955). Indeed, with respect to any employee who, during the tine such provisions are in effect, has completed 31 days of employment with any employer subject to its provisions, the provision constitutes a closed shop and a bar to employment unless that employee continues to remain a member of the Union in good standing. *American Guild of Variety Artists (Fontainebleau Hotel)*, 163 NLRB 457 (1967).[21]

D. *Respondent's Initiation Fee*

The constitution and bylaws of Local 644, as revised on March 1, 1971, set the initiation fee for admission to membership in any classification[22] at four times the highest regular weekly scale for that classification.[23]

The General Counsel alleges in the complaint that the fee is excessive and discriminatory within the proscription of Section 8(b)(5) of the Act. Section 8(b)(5) reads, in pertinent part, as follows:

> [It shall be an unfair labor practice] "to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances . . . .

In construing this subsection, the Board has defined the applicability of the subsection "to situations only where a valid union shop contract covering the employees is in effect." *Ferro Stamping and Manufacturing Co.*, 93 NLRB 1459 (1951).

Since I have already found that the union shop provisions of the contract here are invalid, this condition is not met. Accordingly, I can find no violation of Section 8(b)(5) and I need not consider the other arguments put forward by Respondent and the General Counsel on this issue.

Having found that Respondent violated Section 8(b)(1)(A) and (2) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent discriminated against Jessica Burstein on April 10, 1978, when its executive board voted to table her membership application, not admitting her to membership until March 21, 1979, I shall recommend that her admission be backdated to April 10, 1978, the date of the discrimination against her.

Since I have found that Respondent's actions discriminated against Jessica Burstein by denying her the wages due her in her employment with King-Hitzig Productions, I shall recommend that Respondent make Burstein whole for any loss of earnings suffered by her by reason

[21] Sec. 7(i) of the contract, quoted above, would also lead to the conclusion that Respondent maintained a closed shop, at least for still photographers, but this portion of the contract was not litigated and it may be that its intent is quite different from its tenor. I make no findings on this sec. 7(i).

[22] The Union admits members in the several classifications noted in the wage scales quoted above.

[23] There are exceptions to this applicable to children of members, who pay only 25 percent of the fee, and in cases where new classifications are being organized, upon a vote of two-thirds of the members at a regular or special meeting.

of the discrimination against her.[24] Loss of earnings, if any, shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Having further found that Respondent has maintained invalid and unlawful union-security clauses in violation of Section 8(b)(1)(A) and (2), I shall recommend that it cease and desist enforcing such clauses, and that it immediately revise those union-security clauses to conform to the strictures of Section 8(a)(3) of the Act. Further, I will recommend that Respondent notify all producers with whom these contractual provisions are in effect[25] of the terms of this order together with revised language conforming the union-security provisions of the contract to the law.

The General Counsel has requested that I order the reimbursement of union dues paid under the unlawful union-security provisions. In this case, however, the evidence shows that many members had held their membership for years[26] and there was no evidence to show that any member was coerced or had not acted voluntarily in affiliating themselves with the Union. Thus, I will not recommend that Respondent be ordered to reimburse dues. *Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO* [*Mechanical Handling Systems*] v. *N.L.R.B.*, 365 U.S. 651 (1961).

[24] I leave for the compliance stage of the proceedings the effect, if any, on this recommended order of the letter from Herbert Burstein, Esquire, to me, dated March 19, 1979, copies of which are in evidence in this case.

[25] This will include all producers of feature films and commercials, since it was stipulated that the latter contracts contain union-security provisions substantially identical to those in the feature producers' contracts.

[26] Note the length of service of many members mentioned in the Union's newsletters in evidence.

Conclusions of Law

1. Respondent Local 644 is a labor organization within the meaning of Section 2(5) of the Act.

2. King-Hitzig Productions is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. By denying Jessica Burstein union membership because of her activities on behalf of another labor organization, Respondent has violated Section 8(b)(1)(A) of the Act.

4. By requiring Jessica Burstein's employer to obtain permission of the Union to enter upon the employer's premises or filming location, Respondent has violated Section 8(b)(1)(A) and (2) of the Act.

5. By causing Jessica Burstein's employer to cease paying her wages, Respondent has violated Section 8(b)(1)(A) and (2) of the Act.

6. By maintaining union-security provisions which do not allow the statutory 30-day waiting period, Respondent has violated Section 8(b)(1)(A) and (2) of the Act.

[Recommended Order omitted from publication.]